

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0572**

Eric John Henderson-Bey, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 3, 2022
Affirmed in part, reversed in part, and remanded
Jesson, Judge**

Dakota County District Court
File No. 19HA-CR-11-1922

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Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Reilly, Presiding Judge; Jesson, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Eric John Henderson-Bey challenges the district court's denial of his motion to correct his two felony sentences. Henderson-Bey argues that the district court

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

erred in its calculation of his criminal-history score because (1) a prior cocaine-possession conviction had decayed, (2) the two offenses for which he was sentenced were part of a single behavioral incident, and (3) he should not have been assigned a criminal-history point for an Illinois conviction because there is no equivalent Minnesota felony. Because the district court correctly determined that Henderson-Bey's cocaine-possession conviction had not decayed and that his two sentences were not part of a single behavioral incident, we affirm in part. But because the record does not establish whether there is a Minnesota equivalent for Henderson-Bey's Illinois conviction, we reverse in part and remand for additional proceedings on that question.

FACTS

Because we previously set forth the facts of this case on Henderson-Bey's direct appeal,¹ we focus here only on the facts relevant to Henderson-Bey's challenge to the district court's computation of his criminal-history score. In 2012, the state charged Henderson-Bey with ten counts of criminal sexual conduct and one count of engaging in a pattern of harassing conduct. The charges followed allegations that he had sexual contact with his girlfriend's minor children: C.W. and O.W.² The jury found him guilty. After trial, the district court sentenced Henderson-Bey to 280 months' imprisonment on count one, first-degree criminal sexual conduct, and 38 months' imprisonment on count six, engaging in a pattern of harassing conduct. We affirmed his convictions on appeal.

¹ *State v. Henderson-Bey*, No. A13-0165, 2015 WL 404350 (Minn. App. Feb. 2, 2015), *rev. granted* (Minn. Apr. 14, 2015), and *ord. granting rev. vacated* (Minn. June 30, 2015).

² The state alleged that Henderson-Bey had sexual contact with C.W. between 2003 and 2005, and that he had sexual contact with O.W. between 2008 and 2009.

In October 2020, Henderson-Bey moved the district court to correct his sentence under Minnesota Rule of Criminal Procedure 27.03, subdivision 9, and raised three arguments. In March 2021, the district court denied Henderson-Bey's motion to correct his sentence. The district court concluded that Henderson-Bey was not entitled to relief on two of his three arguments. For the third argument, the district court recognized that the record did not contain the information needed to resolve the issue of whether there is a Minnesota felony equivalent to Henderson-Bey's Illinois conviction. But despite giving the state additional time to obtain further information, the district court denied Henderson-Bey's motion without receiving any additional information from the state.

Henderson-Bey appeals.

DECISION

Because Henderson-Bey already challenged his convictions on direct appeal, he bears the burden of proving that his sentences were based on incorrect criminal-history scores. *Williams v. State*, 910 N.W.2d 736, 743 (Minn. 2018). With this burden of proof in mind, we address Henderson-Bey's arguments in turn.

I. The district court correctly included the cocaine-possession conviction.

Henderson-Bey argues that the district court erred by assigning him a criminal-history point for a prior cocaine-possession conviction when it sentenced him on count one. A prior conviction has decayed, meaning it should not be counted in a defendant's criminal-history score, if the defendant was either discharged from probation or the sentence expired more than 15 years before the current offense. Minn. Sent. Guidelines II.B.1.f (2008). We review de novo the district court's interpretation of the

Minnesota Sentencing Guidelines. *State v. Strobel*, 932 N.W.2d 303, 306 (Minn. 2019). To do so, we begin with the factual basis for including the prior conviction and then evaluate Henderson-Bey’s argument.

The state charged Henderson-Bey with first-degree criminal sexual conduct for actions that occurred “on or about March 15, 2008 – May 31, 2009.” The district court found that Henderson-Bey had been sentenced on the cocaine-possession conviction on December 12, 1991, and he was discharged from probation for that offense on August 24, 1994. Under the guidelines, the cocaine-possession conviction decayed 15 years after he was discharged from probation. Minn. Sent. Guidelines II.B.1.f (2008). Thus, Henderson-Bey’s cocaine-possession conviction decayed on August 24, 2009. Because the last day of the range of dates for count one was May 31, 2009, the district court did not err by assigning Henderson-Bey a criminal-history point for the conviction.

Still, Henderson-Bey asserts that the decay period for his cocaine-possession conviction began on either October 24, 1991 or December 12, 1991. But he does not explain how he arrived at either date. There is no support in the record for the October 24, 1991 date. And while Henderson-Bey was *sentenced* on December 12, 1991, under the version of the sentencing guidelines in effect at the time of his offense, the prior conviction did not begin to decay until he was *terminated from probation* on the offense.³

³ Henderson-Bey cites to the current version of the sentencing guidelines to support his argument, but this reliance is misplaced because the version of the guidelines that was in effect on the date of his offense is controlling. *State v. Kirby*, 899 N.W.2d 485, 493 (Minn. 2017).

Accordingly, Henderson-Bey has not met his burden of showing that his sentence for count one was based on an incorrect criminal-history score.

II. The district court correctly sentenced Henderson-Bey for both counts.

Next, Henderson-Bey argues that the district court erred by assigning him a criminal-history point for count six when it sentenced him on count one, because counts one and six arose from a single behavioral incident. We begin our analysis of this claim with the statutory directive that a person who violates multiple laws in a single behavioral incident can only be sentenced for one of the offenses. Minn. Stat. § 609.035 (2002). But acts committed against separate victims at different times do not constitute a single behavioral incident. *Munt v. State*, 920 N.W.2d 410, 417 (Minn. 2018). Whether multiple sentences violate section 609.035 is a question of law, which we review de novo. *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020).

Turning first to count one, the jury found Henderson-Bey guilty of first-degree criminal sexual conduct in violation of Minnesota Statutes section 609.342, subdivision 1(h)(iii) (2008), which applies when the defendant has a significant relationship to the complainant and “the sexual abuse involved multiple acts committed over an extended period of time.” And for count six, the jury found Henderson-Bey guilty of engaging in a pattern of harassing conduct in violation of Minnesota Statutes section 609.749, subdivision 5 (2002). A person violates section 609.749, subdivision 5, when the person commits two or more acts—within a five-year period against one or more members of a single household—that violate, among others, the statutes prohibiting criminal sexual conduct.

To prove that Henderson-Bey engaged in a pattern of harassing conduct, the state submitted evidence of eight acts of criminal sexual conduct in varying degrees against two victims: O.W. and C.W. Henderson-Bey committed three of the eight acts against C.W. between 2003 and 2005. He committed the remaining five acts against O.W. in 2008 and 2009. To find Henderson-Bey guilty on this count, the jury only had to find that Henderson-Bey committed two of the eight total acts of criminal sexual conduct against either O.W. or C.W.⁴ If the jury found Henderson-Bey guilty of at least two of the three offenses committed against C.W., then the district court did not violate section 609.035 by sentencing Henderson-Bey for both counts because counts one and six were committed against different victims at different times. *Branch*, 942 N.W.2d at 713.

But, Henderson-Bey argues, the record does not clearly establish *which* of the eight total offenses the jury found he committed. And because his conviction for count one involves “multiple acts committed over an extended period of time” against O.W., Henderson-Bey asserts that the factual basis for count one overlaps with all five potential offenses against O.W. that could serve as the factual basis for count six. Thus, because the record does not *confirm* that the jury found him guilty of engaging in a pattern of harassing conduct for only the offenses against C.W., Henderson-Bey contends that his two sentences violate section 609.035 because they *could* have stemmed from a single behavioral incident.

⁴ The jury had to find two acts against a single victim, instead of one against each, because C.W. was not a resident of the household when the offenses against O.W. occurred.

We disagree. Because Henderson-Bey previously appealed his conviction, he now bears the burden of proving that his sentence was based on an incorrect criminal-history score. *Williams*, 910 N.W.2d at 737. And he has shown no basis to conclude that the jury did convict him based solely on the offenses committed against O.W. Absent this showing, Henderson-Bey cannot prove that his two sentences violate section 609.035 because he has not established that the two offenses formed a single behavioral incident.⁵ Accordingly, Henderson-Bey's sentence does not violate section 609.035.

III. The district court prematurely denied Henderson-Bey's motion regarding the Illinois conviction.

Henderson-Bey argues that the district court erred by assigning him a criminal-history point for an Illinois conviction when it sentenced him on count six. The Minnesota Sentencing Guidelines require that out-of-state convictions be included in calculating a criminal-history score. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); Minn. Sent. Guidelines II.B.5 (2003). But to be included, the state must lay the foundation for the district court by showing that the prior conviction was valid, the defendant was the person involved, and that the crime would be a felony if committed in Minnesota.⁶

⁵ Henderson-Bey further argues that because section 609.749, subdivision 5, is ambiguous, he should be given the benefit of that ambiguity. But the ambiguity that he references relates to which of the predicate offenses the jury found him guilty of. And we have rejected similar arguments where the victim testified to ongoing abuse, the prosecution did not distinguish proof of certain incidents from others, and the defendant did not present separate defenses for each incident. *State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23, 2008).

⁶ At oral argument, the state contended that, following *Williams*, Henderson-Bey should bear the burden of proving that there is no Minnesota equivalent for his out-of-state conviction. But because the state did not present that argument to the district court, we

State v. Maley, 714 N.W.2d 708, 711 (Minn. App. 2006). Because Henderson-Bey challenges the district court’s interpretation of the sentencing guidelines in making this argument, our review is de novo. *Strobel*, 932 N.W.2d at 306.

Here, the district court assigned Henderson-Bey one criminal-history point for an “Unlawful Use of Weapon” charge. The only information in the record about this charge is in a presentence investigation report that Henderson-Bey completed following trial. That report indicates that, according to an earlier federal presentence investigation report, Henderson-Bey stated that he brought guns from Alabama to Chicago, not knowing that it is a crime in Chicago to possess any firearms without a firearm owner’s identification card.⁷ But neither the federal presentence investigation report nor the statute under which Henderson-Bey was convicted is in the record.

In its memorandum in opposition to Henderson-Bey’s motion to correct his sentence, the state noted that it requested records about the conviction from Illinois in December 2020. The state represented that, as of February 2021, no records had yet been received from Illinois. And the state conceded that the Illinois statute under which Henderson-Bey asserts he was convicted includes “prohibitions that would not be considered a felony in Minnesota.” Accordingly, the state requested more time from the district court to receive the records from Illinois. But in March 2021, the district court

decline to address it here for the first time. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

⁷ Henderson-Bey asserts that he was convicted of violating the version of Chapter 430 Act 65 Section 2 of the Illinois Compiled Statutes that was effective in 1989.

denied Henderson-Bey's motion to correct his sentence, despite giving the state until May 2021 to obtain the records.

As a result of this March 2021 order, the state—thinking that it had until May 2021 to do so—did not meet its burden of showing that the Illinois conviction would be a felony in Minnesota. *Maley*, 714 N.W.2d at 711. Because the record does not contain sufficient information about Henderson-Bey's Illinois conviction for the district court to determine whether the state laid the foundation for the court to assign Henderson-Bey a criminal-history point, we reverse the district court on this point and remand for additional proceedings.⁸ *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (permitting the state to further develop the sentencing record for the district court to determine whether to include out-of-state convictions), *rev. denied* (Minn. July 15, 2008).

Affirmed in part, reversed in part, and remanded.

⁸ The state argues that we need not reach this issue because even if Henderson-Bey's criminal-history score for count six is inaccurate, his total prison sentence would not change because his sentence for count one is longer. But we address the issue because the purpose of the sentencing guidelines is to ensure equity in sentencing, a goal that is furthered by the proper calculation of Henderson-Bey's criminal-history score. Minn. Sent. Guidelines I (2003).